

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



DATE: DECEMBER 22, 1988  
CASE NO. 88-INA-356

IN THE MATTER OF

ANDER TRADING, INC.  
Employer

on behalf of

MARCELA JOSEFINA JACIR  
Alien

Appearance: Eduardo Fernandez, Esquire  
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and  
Brenner, DeGregorio, Guill, Schoenfeld, and Tureck,  
Administrative Law Judges

LAWRENCE BRENNER  
Administrative Law Judge

**DECISION AND ORDER**

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

The Employer, Ander Trading Inc., filed the application for labor certification on behalf of the Alien, Marcela Josefina Jacir, for the position of Administrative Assistant (AF 47). The job duties included coordinating clerical activity and preparing employee rating reports to management. In its ETA 750A application form, the Employer stated the salary as \$350 per week.

The Certifying Officer (C.O.), in his February 10, 1988 Notice of Findings, denied the application for labor certification (AF 10-14). The C.O. stated that at least one qualified U.S. worker, Maria Gonzalez, was qualified for the position, but that the Employer failed to offer Gonzalez the offered wage of \$350 per week. The Employer, in its rebuttal of February 23, 1988, contended that Gonzalez was offered the position at \$350 per week but that she refused the job (AF 8-9). On April 29, 1988, the C.O. issued his Final Determination, in which he denied certification (AF 6-7). The Employer filed a statement with its Request for Review dated May 23, 1988. The C.O. did not file a brief.

### Discussion

During the recruitment period the Employer, in a letter to the Job Service of Florida, stated that Maria Gonzalez was a "quite capable candidate" but that she "was not interested in working with us nor at the salary that we offered" (AF 67). The salary listed in the ETA 750A (AF 47), as well as the salary listed in the newspaper advertisement (AF 65), was \$350 per week. The C.O., in his Notice of Findings, stated that the Employer's assertions to the Job Service of Florida were contrary to a statement made by Gonzalez that the Employer refused to pay the offered wage of \$350 per week (AF 13). Significantly, Gonzalez's alleged statement is not submitted by the C.O.

The Employer, in its rebuttal, submitted a signed statement from Andres Dielingen, who interviewed Gonzalez (AF 9). According to Dielingen, Gonzalez was offered the position at the salary stated in the advertisement. Gonzalez, the affidavit states, was earning a similar salary, receiving greater benefits and working in a more professional environment at her present place of employment, a large corporation. Dielingen concluded, according to his impression of the interview, that Gonzalez was not interested in working for the Employer, effectively arguing that she turned the job down.

Oddly, the C.O., in his Final Determination, stated that he did not dispute the Employer's rebuttal, but at the same time found that there is no evidence to indicate that Gonzalez was ever

offered the position (AF 7). The C.O. also stated that, according to Gonzalez's report, she was not offered the position because the Employer refused to pay the stated wage of \$350 per week. As a result, the C.O. denied the application for certification.

The Employer, in its Request for Appeal, noted the inconsistency of the C.O.'s statement concerning the veracity of the Employer's rebuttal with the C.O.'s other statements and actions (AF 1-4). The Employer also stated that it would like to see Gonzalez's signed statement which the C.O. relied on to contradict the Employer. In addition, the Employer reiterated its arguments made in rebuttal that Gonzalez was not interested in the position because she was receiving greater benefits with her present employer.

This Board is unable to discern why the C.O. believed the U.S. applicant over the Employer. The C.O. bases its determination on a statement of the U.S. applicant, Gonzalez, alleging that the Employer refused to pay her the advertised wage. Notably, the statement itself is absent from the record. The Employer, in its Request for Appeal, legitimately questions the C.O.'s reliance on an unseen, unproduced statement. Even assuming the statement accurate, the C.O. provides no information as to the nature of the statement; whether the alleged statement was made orally, in response to a questionnaire, or in writing. Knowledge of the nature and quality of the statement is essential in order to give the remarks proper weight. The absence of the statement itself in the record, combined with the lack of any information concerning the quality of the statement, is fertile ground for misinterpretation.

On the other hand, doubt remains as to veracity of the Employer's assertions. In its letter to the Job Service of Florida the Employer asserted that Gonzalez was not interested in working with the Employer at the salary the Employer offered (AF 67). The Employer, however, did not then state that it offered Gonzalez the advertised wage. *Id.* Significantly, the Employer admits in a letter to the state agency that another U.S. applicant, Angela Wong, was not interested in working for the Employer at \$325 per week, \$25 less than the advertised wage (AF 15, 66). These facts, taken together, cast some doubt on the assertions made by the Employer in its rebuttal and in the Request for Review, that it offered Gonzalez the position at the advertised wage of \$350 and that Gonzalez refused the offer.

The confusion and possible misinterpretations engendered by the absence of Gonzalez's statement from the record require that the case be remanded to the C.O. pursuant to the following directives. On remand the C.O. is to supply to the Employer the statement directly from Gonzalez documenting the C.O.'s allegation that the Employer did not offer the applicant the advertised wage. If the C.O. is able to supply the statement the C.O. is directed to issue a new Notice of Findings. If the C.O. is unable to supply the statement the C.O. is directed to grant certification.

ORDER

It is ORDERED that this matter is hereby REMANDED for further consideration and determination consistent with this decision.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

LB/DC/gaf